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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

FREDERICK W. DIETERICH,

Plaintiff and Respondent,

v.

DAN FRAKER et al.,

Defendants and Appellants.

G040027

(Super. Ct. No. 07CC05580)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Charles Margines, Judge. Reversed and remanded with directions.

Ford, Walker, Haggerty & Behar, K. Michele Williams for Defendants and Appellants.

Eric V. Luedtke for Plaintiff and Respondent.

Colleen Duff-Fraker and Dan Fraker (hereafter collectively the Frakers unless the context indicates otherwise) appeal from an order denying their special motion to strike a defamation complaint filed against them by their former physician, Frederick W. Dieterich.¹ After they settled their medical malpractice/wrongful birth action against Dieterich, the Frakers were interviewed for an article that appeared in People Magazine, and Dieterich sued them for defamation, misrepresentation, and breach of contract. They contend their special motion to strike should have been granted because Dieterich's action arose out of protected activity and he failed to demonstrate a probability of prevailing. We agree and reverse the order and remand with directions to grant the special motion to strike.

FACTS

The Underlying Medical Malpractice Action

In August 2004, the Frakers, represented by attorney Lawrence S. Eisenberg, filed a medical malpractice/wrongful birth action (hereafter the medical malpractice action) against Dieterich, the obstetrician who provided prenatal care to Colleen Fraker and delivered the couple's daughter in 2003. (*Duff v. Dieterich*, Orange Super. Ct. case No. 04CC08982.) The Frakers alleged Dieterich failed to properly inform them about Alpha-Fetoprotein (AFP) testing that would have disclosed whether their unborn child was at risk for genetic neural tube defects such as spina bifida. Their daughter was born disabled by a severe form of spina bifida. The

¹ Code of Civil Procedure section 425.16 authorizes a special motion to strike a Strategic Lawsuit Against Public Participation (SLAPP) action, and is referred to as the anti-SLAPP statute. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 85, fn. 1 (*Navellier*).)

All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

Frakers alleged Dieterich's negligence deprived them of the opportunity to decide whether to abort the unborn fetus.

In August 2005, the Frakers and Dieterich settled the medical malpractice action. The release contained a confidentiality provision stating: "The parties agree that neither they nor their attorneys nor representatives shall reveal to anyone, other than as may be mutually agreed to in writing, any of the terms of this Agreement or any of the amounts, numbers or terms and conditions or any sums payable to [the Frakers] hereunder."

The People Magazine Article

In May 2006, People Magazine², published an article titled *Precious Child, Impossible Choice*, recounting the Frakers' story. The article identified Dieterich as the Frakers' obstetrician whom they had sued after their daughter's birth. It stated that under state law, doctors are supposed to inform pregnant women about the availability of prenatal testing thereby enabling women to either prepare for a child with a disability or "make the agonizing choice to terminate the pregnancy."

The article then went on to describe the Frakers' daughter's condition. It stated that although they could not now say what they would have done, the Frakers "resent not knowing about [their daughter's] condition sooner. 'The main thing is, we were never given a choice,' says Colleen [Fraker]." The article stated about three percent of abortions are performed in response to fetal health problems and "the Frakers are among thousands of parents who have filed so-called wrongful birth suits against their doctors, charging they should have been given that option. Says Larry Eisenberg, [the Frakers'] attorney: 'The whole purpose behind prenatal testing is to

² People Magazine and its parent company, Time, Inc., were both named as defendants. For convenience, both will be referred to collectively as People Magazine.

allow the pregnant woman and her partner to make an informed decision about what to do.’”

The article went on to explain, “Under the terms of a settlement reached with their doctor . . . [the Frakers] are forbidden to discuss full details of their case. They claim they were never informed of a simple blood test called AFP screening” After the Frakers’ daughter was born with spina bifida, “[h]ealth workers told them the condition could have been detected”

Dieterich’s Defamation Action: Defendants’ Special Motions to Strike

Dieterich filed the instant suit against the Frakers, Eisenberg, and People Magazine. His complaint contained four tort causes of action against all the defendants—defamation per quod, defamation per se, negligent misrepresentation, and intentional misrepresentation.

The complaint identified the following statements as being defamatory: (1) the Frakers claim they “‘were never informed of a simple blood test called AFP screening’”; (2) Colleen Frakers’ statement we “‘were never given a choice’”; and (3) Eisenberg’s statement, “‘The whole purpose behind pre-natal testing is to allow the pregnant woman and her partner to make an informed decision about what to do.’”

Dieterich’s misrepresentation causes of action alleged the statements in the article were not true and “readers . . . and the public reasonably relied on defendants representations” Dieterich alleged he was harmed in turn because his reputation and business suffered.

Dieterich’s complaint also contained a breach of contract cause of action against the Frakers and Eisenberg. He alleged they breached the confidentiality clause of the settlement agreement by participating in the People Magazine interview.

The Frakers, Eisenberg, and People Magazine each filed a special motion to strike. All three motions argued Dieterich's complaint arose from protected First Amendment activity on an issue of public interest.

People Magazine argued the statements in the article were absolutely privileged under Civil Code section 47, subdivision (d)(1), because they were a fair and accurate summary of the judicial proceedings and records (i.e., the Frakers' complaint in the underlying medical malpractice action against Dieterich). One of the article's authors declared she had obtained a copy of the complaint in the medical malpractice action from the public court file and relied on the allegations in the complaint in preparing the article. People Magazine also argued Dieterich's failure to demand a retraction pursuant to Civil Code section 48a precluded him from claiming special damages.

Eisenberg asserted Dieterich's complaint did not allege any defamatory statements attributable to him. He also contended Dieterich could not establish his breach of contract cause of action because the complaint did not attach the settlement agreement nor plead its specific terms. Eisenberg's declaration set forth the confidentiality provision from the settlement agreement, which did not preclude discussion of the underlying medical malpractice case—only discussing the terms of the settlement.

The Frakers argued the statements they made to People Magazine, contained in the article, were absolutely privileged under the litigation privilege embodied in Civil Code section 47, subdivision (b). They contended the statements were related to the allegations made in their complaint against Dieterich in the medical malpractice action.

Dieterich filed a single opposition addressing all three special motions to strike. He disputed his action involved any protected activity because the article did

not involve a matter of interest to the public—rather it involved a purely private matter concerning one person’s medical treatment and a rare birth defect. Dieterich disputed the litigation privilege of Civil Code section 47, subdivision (b), applied to any of the defendants. His opposition did not address the fair report privilege of Civil Code section 47, subdivision (d)(1).

As for demonstrating a probability of prevailing, Dieterich asserted he had a probability of prevailing on his defamation causes of action against the Frakers. Dieterich’s opposition made no mention of his misrepresentation causes of action or his breach of contract cause of action.

As for Colleen Frakers’ statement, “‘we were never given a choice[.]’” Dieterich claimed he had discussed AFP testing with Colleen Fraker. He attached pages from Colleen Frakers’ deposition in the medical malpractice action. Colleen Fraker had testified she underwent AFP testing when she was pregnant with her older child. She testified Dieterich had given her a lab slip for AFP testing. But she testified he discouraged her from having the testing telling her the test frequently showed false-positive results that could result in further unnecessary testing (such as an amniocentesis), and because she was young and had a healthy child already, she did not need to take the test. Dieterich attached his own declaration, stating he discussed AFP testing with Colleen Fraker, gave her a referral for the test, told her the State of California, and he, recommended AFP testing, but could not force her to undergo the testing.

Dieterich also submitted a declaration from Kathy Morris, who stated she read the People Magazine article and understood it to mean Colleen Fraker was never given the opportunity to have AFP testing. The article left Morris with a negative impression of Dieterich, and Morris concluded she would never go to him for medical treatment, or refer anyone to him.

The Order

The three special motions to strike were heard and ruled on together. At the hearing, Dieterich's attorney stated he did not oppose granting Eisenberg's special motion to strike as to the breach of contract cause of action, conceding the confidentiality clause in the settlement agreement did not prohibit discussion of the underlying case.

The trial court concluded Dieterich's complaint arose out of protected activity. "Notwithstanding the mention of [the medical malpractice action], the article at issue herein is generally about the right of parents-to-be to be informed of the availability of tests to determine if the fetus has certain medical conditions, the ethical quandary in which future parents can find themselves when they learn of a defect in the fetus, and the love parents have for children with birth defects. These themes are of sufficient widespread public interest that the publication of the article is a 'protected activity' under . . . section 425.16."

The court then turned to Dieterich's probability of prevailing. As to People Magazine, the court found there was no probability of prevailing for, among other reasons, the absolute privilege of Civil Code section 47, subdivision (d)(1), for news media fair reporting on judicial proceedings. The court noted that as to People Magazine, the article simply reflected the Frakers' position in the underlying medical malpractice litigation.

As to Eisenberg, the court concluded Dieterich had not shown a probability of prevailing because the one allegedly defamatory statement attributed to him, regarding the purpose of prenatal testing, was not defamatory. Additionally, due to Dieterich's concession in open court, Dieterich could not prevail on his breach of contract cause of action.

As to the Frakers, the trial court ruled quite differently. Without mentioning any of the four tort causes of action in particular, the court concluded Dieterich had demonstrated a probability of prevailing in his lawsuit because there was evidence Colleen Fraker was on notice of the availability of AFP testing and thus her statement they were never given notice was false. The court concluded the litigation privilege (Civ. Code, § 47, subd. (b)), did not apply to the Frakers because the statements made to People Magazine were not in furtherance of their litigation, which had already been terminated. Furthermore, because the breach of contract cause of action was not addressed by the Frakers in their special motion to strike, the motion was denied as to that cause of action as well.

DISCUSSION

A. General Principles

Section 425.16, subdivision (b)(1), states, “A cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” Section 425.16, is to be “construed broadly.”

Consideration of a section 425.16 special motion to strike anticipates a two-step process. “First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant’s burden is to demonstrate that the act or acts of which the plaintiff complains were taken ‘in furtherance of the [defendant]’s right of petition or free speech under the United States or California Constitution in connection with a public issue,’ as defined in the statute. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a

probability of prevailing on the claim.” (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) We review a trial court’s ruling on a special motion to strike de novo. (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 675 (*Peregrine Funding, Inc.*).)

B. Step One: Arising Out of Protected Activity

“[T]he statutory phrase ‘cause of action . . . arising from’ means simply that the defendant’s act underlying the plaintiff’s cause of action must *itself* have been an act in furtherance of the right of petition or free speech. [Citation.] . . . [T]he critical point is whether the plaintiff’s cause of action itself was *based on* an act in furtherance of the defendant’s right of petition or free speech. [Citations.] . . . ‘A defendant meets this burden by demonstrating that the act underlying the plaintiff’s cause fits one of the categories spelled out in section 425.16, subdivision (e)’ [Citations.]” (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.)

Section 425.16, subdivision (e), states: “As used in this section, ‘act in furtherance of a person’s right of petition or free speech under the United States or California Constitution in connection with a public issue’ includes: . . . (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.”

Although Dieterich protests his complaint did not arise out of protected activity, we agree with the trial court the action came well within the anti-SLAPP statute’s purview. It arose out of the Frakers’ statements to People Magazine when interviewed on a matter of public interest. The article, and the Frakers’ statements, fall within section 425.16, subdivision (e)(3) and (4).

“‘The definition of “public interest” within the meaning of the anti-SLAPP statute has been broadly construed to include not only governmental matters, but also private conduct that impacts a broad segment of society’ [Citation.]” (*Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1233.) The act underlying all causes of action in Dieterich’s complaint is the Frakers’ participation in the interview in which they discussed not only the trials and tribulations associated with parenting a severely disabled child, but having foregone genetic testing that would have revealed the birth defect, and having pursued a wrongful birth lawsuit against their physician. The article was not simply an exposé about the Fraker family’s personal health issues, but involved themes such as the availability of genetic testing to determine if a fetus suffers a significant genetic defects, the tough choices future parents can find themselves having to make when they learn of a defect in the fetus, and the recent phenomenon of wrongful birth lawsuits filed when parents believe they were not properly provided with testing during pregnancy that could have revealed a significant birth defect. These themes are of sufficient widespread public interest that participation in the interview and the publication of the article is a “protected activity” under section 425.16.

C. Step Two: Probability of Prevailing

Having concluded Dieterich’s complaint arises out of protected activity, we turn to whether Dieterich demonstrated a probability of prevailing on any of his five causes of action against the Frakers. We conclude he did not and for this reason, the trial court erred by denying the Frakers’ special motion to strike.

1. Defamation Causes of Action

A. The Frakers' statements are not protected by the Civil Code section 47, subdivision (b), litigation privilege.

The Frakers contend the litigation privilege contained in Civil Code section 47, subdivision (b), bars Dieterich's action. The trial court concluded the litigation privilege did not apply because the medical malpractice action was no longer pending and, thus, the statements made in the People Magazine interview were not made in furtherance of the litigation. The trial court was correct.

Civil Code section 47, subdivision (b), makes privileged a statement made in any judicial proceeding. The privilege is absolute, and "applies to any publication required or permitted by law in the course of a judicial proceeding to achieve the objects of the litigation, even though the publication is made outside the courtroom and no function of the court or its officers is involved. [Citations.] [¶] The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action. [Citations.]" [Citation.] Thus, "communications with 'some relation' to judicial proceedings" are "absolutely immune from tort liability" by the litigation privilege [Citation.] It is not limited to statements made during a trial or other proceedings, but may extend to steps taken prior thereto, or afterwards. [Citation.]" (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1057 (*Rusheen*).)

Although the litigation privilege can apply to statements made after the litigation has terminated, they must nonetheless further the objects of the litigation. For example, in *Rusheen*, the court held the litigation privilege applied to an attorney's postjudgment efforts to enforce the judgment. (*Rusheen, supra*, 37 Cal.4th at pp. 1059-1061.) But here, the medical malpractice action was settled. Thus, the

Frakers' statements made after the settlement cannot be said to have been made to further the objectives of the lawsuit. (See *Laffer v. Levinson, Miller, Jacobs & Phillips* (1995) 34 Cal.App.4th 117, 123 [litigation privilege did not apply to statements made after action was settled].) Accordingly, the trial court correctly concluded the litigation privilege does not apply.

B. The Frakers' statements to People Magazine are absolutely protected under Civil Code section 47, subdivision (d)(1).

Although the Frakers relied on the litigation privilege contained in Civil Code section 47, subdivision (b), to support their absolute privilege argument below, People Magazine, relied on the fair report privilege of Civil Code section 47, subdivision (d)(1). The trial court concluded the article was absolutely privileged under that provision because it accurately represented the Frakers' position in the medical malpractice action. However, the court granted only People Magazine's special motion to strike.

On appeal, one of the Frakers' primary arguments is the fair report privilege contained in Civil Code section 47, subdivision (d)(1), applies to them as well as to People Magazine. In his respondent's brief, Dieterich does not address the fair report privilege—only the litigation privilege. Although the applicability of the fair report privilege to the Frakers was not raised below, we may consider it for the first time on appeal as it presents a pure question of law. (*Bihun v. AT & T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 998-999 [issue not raised in trial court can be addressed on appeal when pure question of law involved], overruled on other grounds in *Lakins v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664; *Howard v. Oakland Tribune* (1988) 199 Cal.App.3d 1124, 1128 [applicability of fair report privilege is a question of law].)

Civil Code section 47 provides in part: “A privileged publication or broadcast is one made: [¶] . . . [¶] (d)(1) By a fair and true report in, or a communication to, a public journal, of (A) judicial, (B) legislative, or (C) other public official proceeding, or (D) of anything said in the course thereof,”

Civil Code section 47, subdivision (d)(1), confers an absolute privilege on any fair and true report in or any communication to the press about a judicial proceeding. A fair and true report is privileged if it captures the substance of the judicial proceeding that is being reported. (*Kilgore v. Younger* (1982) 30 Cal.3d 770, 777; *Braun v. Bureau of State Audits* (1998) 67 Cal.App.4th 1382, 1389.) Furthermore, the fair report privilege is applied broadly and survives termination of the judicial proceeding. For example, in *Sipple v. Foundation for Nat. Progress* (1999) 71 Cal.App.4th 226 (*Sipple*), the fair report privilege applied to a magazine article containing statements made in discovery proceedings in a child custody proceeding that took place five years earlier.

““In the context of judicial proceedings, case law is clear that reports which comprise a history of the proceeding come within the privilege, as do statements made outside the courtroom and invoking no function of the court, e.g., representations and theories expressed by [personnel in relation to the proceeding]. . . .”” (*Sipple, supra*, 71 Cal.App.4th at p. 242.) Under this standard, a communication is protected if the “gist” or “sting” of the report accurately conveys the matters in the judicial proceeding and does not change the complexion of the privileged material. (*Id.* at pp. 243-244; *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal.App.4th 855, 869-870.) The broad language of Civil Code section 47, subdivision (d)(1), encompasses reports or communications to the press about allegations in litigation. (*Microsoft Corp. v. Yokohama Telecom Corp.* (C.D.Ca. 1998) 993 F.Supp. 782, 784-785; *Kim v. Walker* (1989) 208 Cal.App.3d 375, 383, rejected

on other grounds by *State v. Superior Court (Bodde)* (2004) 32 Cal.4th 1234, 1239, fn. 7.)

One of the themes of the People Magazine article was the phenomenon of so-called wrongful birth medical malpractice lawsuits. The “gist” or “sting” of the Frakers’ statements to People Magazine concerned the substance of their complaint in the medical malpractice action. The trial court correctly concluded the statement that “Under the terms of a settlement reached with their doctor . . . [the Frakers] are forbidden to discuss full details of their case. They claim they were never informed of a simple blood test called AFP screening . . . [.]” was the authors’ summary of the Frakers’ position in the medical malpractice litigation and absolutely privileged.

The only statement in the article attributable to the Frakers was Colleen Fraker’s statement ““we were never given a choice[.]”” That quote followed the article’s discussion of state law requirements that pregnant women be informed about the availability of prenatal testing so they can prepare for a child with a disability or “make the agonizing choice to terminate the pregnancy.” And it followed the article’s explanation that after the fact the Frakers could say what they would have done, but they “resent[ed] not knowing about [their daughter’s] condition sooner.” In the context of the article, it is apparent the ““choice”” to which Colleen Fraker referred was the choice about proceeding with her pregnancy. The statements in the People Magazine article completely reflected the Frakers’ position in the wrongful birth medical malpractice case. The Frakers alleged they were not properly informed about the genetic testing and, thus, were not given the opportunity to decide whether to terminate the pregnancy. Accordingly, Colleen Frakers’ statement was privileged under Civil Code section 47, subdivision (d)(1), and Dieterich had no probability of prevailing on his defamation causes of action.

2. *Misrepresentation and Breach of Contract Causes of Action*

Because the Frakers demonstrated Dieterich's action against them arose out of protected activity, the burden shifted to Dieterich to demonstrate he had a probability of prevailing on his misrepresentation and breach of contract causes of action. ““[T]he plaintiff ‘must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.’” [Citation.] The plaintiff must make a prima facie showing of facts that would, if proven, support a judgment in the plaintiff's favor. [Citations.] The plaintiff cannot rely on the allegations of the complaint alone, but must present admissible evidence. [Citation.]” (*Nagel v. Twin Laboratories, Inc.* (2003) 109 Cal.App.4th 39, 45.)

In his opposition to the combined special motions to strike, Dieterich made absolutely no mention of his intentional and negligent misrepresentation causes of action. We assume the absolute privilege that precludes Dieterich's defamation causes of action precludes his other tort causes of action as well. (See *Rubin v. Green* (1993) 4 Cal.4th 1187, 1200-1204 [Civ. Code, § 47, subd. (b), litigation privilege applies to all tort causes of action except malicious prosecution].) But even were that not the case, Dieterich has not shown a probability of prevailing on his misrepresentation causes of action. Dieterich must demonstrate he relied on the alleged misrepresentation. (*Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1089, fn. 2.) There are neither allegations nor evidence that Dieterich relied to his detriment on statements made in the People Magazine article. Rather, Dieterich alleged misrepresentation on the theory the statements were read by members of the public who then possibly relied upon those statements in deciding to not choose him as their doctor (and thus causing him harm). That is simply an allegation of defamation, and does not support a misrepresentation cause of action.

Dieterich similarly showed no probability of prevailing on his breach of contract cause of action. The trial court denied the Frakers' special motion to strike as to the breach of contract cause of action because they did not specifically address it in their motion. But the Frakers' motion sought to strike the entire complaint. The entire complaint arose out of the exact same *act*—participating in the People Magazine interview—which was protected activity, making the entire complaint subject to a special motion to strike. The burden was on Dieterich to come forward with evidence demonstrating a probability of prevailing.

Dieterich's complaint alleged the Frakers breached the confidentiality clause of the settlement agreement by participating in the People Magazine interview, but did not set out the terms of that agreement. Dieterich's opposition to the Frakers' special motion to strike made no mention of his breach of contract cause of action and he provided no evidence in support of it. The Frakers' attorney, Eisenberg, offered the only evidence on this cause of action by his own declaration setting forth the relevant provision from the settlement agreement. It precluded discussing the terms of settlement, but imposed no constraints on the parties about discussing the underlying medical malpractice action. At the hearing, Dieterich's attorney agreed Eisenberg's special motion to strike should be granted as to the breach of contract cause of action, conceding the confidentiality clause in the settlement agreement did not prohibit discussion of the underlying case.

On appeal, Dieterich again points to no evidence that would have supported a judgment on the breach of contract cause of action. His only argument is the breach of contract cause of action does not arise out of protected activity—a contention we have already rejected—and no abuse of discretion has been shown. But we independently review the special motion to strike (*Peregrine Funding, Inc., supra*,

133 Cal.App.4th at p. 675), and based upon that review, we conclude the motion should have been granted to the breach of contract cause of action as well.

DISPOSITION

The order denying the special motion to strike is reversed and the matter is remanded to the trial court with directions to enter a new order granting the motion. The Appellants are awarded their costs on appeal.

O'LEARY, ACTING P. J.

WE CONCUR:

MOORE, J.

FYBEL, J.